84-1408

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NO.

in the Supreme Court of the United States

OCTOBER TERM, 1984

RICK RENNER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS ELEVENTH CIRCUIT

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22pp

QUESTION PRESENTED

WHETHER THE OPINION OF THE ELEVENTH CIRCUIT AFFIRMING RENNER'S CONVICTION OF CONSPIRACY AND FACILITATION CHARGES CONFLICTS WITH DECISIONS OF THIS COURT AND THE COURTS OF APPEALS FOR THE SECOND, SEVENTH, EIGHTH, NINTH AND TENTH CIRCUITS, AND SO FAR SANCTIONS A DEPARTURE BY THE TRIAL COURT FROM ACCEPTED JUDICIAL PROCESS AS TO CALL FOR THE EXERCISE OF THIS COURT'S SUPERVISORY POWER TO PREVENT MANIFEST INJUSTICE BECAUSE THE EVIDENCE AGAINST RENNER WAS INSUFFICIENT TO CONVICT ON ANY CHARGE, BUT HE WAS IRREPARABLY PREJUDICED BY THE MASSIVE SPILLOVER EFFECT OF THE EVIDENCE AGAINST THE CO-DEFENDANT?

PARTIES INVOLVED

In these proceedings, Petitioner, RICK RENNER, was the defendant and the appellant in the courts below. The UNITED STATES OF AMERICA, Respondent herein, was the prosecution and the appellee. There was one co-defendant in the trial court, THEOPHILIS E.M. NICHOLIS, who also was an appellant in the Eleventh Circuit.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES INVOLVED	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
PETITION	1
OPINION BELOW	2
JURISDICTIONAL STATEMENT	2
CONSTITUTIONAL PROVISIONS	2
STATUTORY PROVISIONS	3
STATEMENT OF THE CASE AND FACTS	5
REASON FOR GRANTING THE WRIT	7
CONCLUSION	14
APPENDIX	15

TABLE OF AUTHORITIES

Cases	Page
Thompson vs. City of Louisville, 326 U.S. 199, 80 S. Ct. 624 (1960)	7, 8
Tillman vs. U.S., 406 F.2d 930 (5th Cir. 1977)	13
Tinsley vs. U.S., 43 F.2d 890 (8th Cir. 1930)	7, 8
U.S. vs. Bastone, 526 F.2d 971 (7th Cir. 1976)	7, 9
U.S. vs. Gaines, 563 F.2d 1352 (9th Cir. 1977)	7, 13
U.S. vs. Menichino, 497 F.2d 935 (5th Cir. 1974)	10
U.S. vs. Moss, 591 F.2d 428 (8th Cir. 1979)	7, 8
U.S. vs. Rey, 641 F.2d 222 (5th Cir. 1971)	10
U.S. vs. Sisca, 503 F.2d 1337 (2d Cir. 1973)	7, 8

TABLE OF AUTHORITIES (Continued)

Cases	Page
U.S. vs. Watson, 594 F.2d 1330 (10th Cir. 1979)	7, 10
United States Code	
Title 21 Section 841(a)(1)	3, 4
Section 843(b)	3, 4
Section 846	3, 4
Title 28 Section 1254	2
Supreme Court Rules	
Rule 17.1 (a)	2
17.1 (c)	2

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RICK RENNER,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS ELEVENTH CIRCUIT

RICK RENNER, through counsel, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, entered in this proceeding on November 30, 1984.

OPINIONS BELOW

The judgment and sentence of the United States District Court in and for the Middle District of Florida, was entered on April 27, 1984. A copy is included in the Appendix at the end of this petition as Appendix 1. The opinion of the United States Court of Appeals for the Eleventh Circuit, reproduced and attached hereto as Appendix 4-14, was entered on November 30, 1984. It is unreported.

JURISDICTIONAL STATEMENT

The judgment of the Eleventh Circuit was entered on November 30, 1984. A petition for rehearing by the panel was filed timely, and was denied by order dated January 11, 1985. Copies of the petition for rehearing and the order of denial are reproduced and attached hereto as Appendix 15-20 and 21, respectively. This petition for writ of certiorari was filed within sixty days of the denial of the petition for rehearing. The jurisdiction of this court is invoked under 28 U.S.C. §1254 and Supreme Court Rule 17.1(a) and (c).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment of the United States Constitution:

> Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property.

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment of the United States Constitution:

> Jury trial for crimes, and procedural rights
>
> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATUTORY PROVISIONS

The statutory provisions with which RENNER was charged by indictment are Title 21, United States Code, Sections 841(a)(1), 843(b) and 846.

§841. Prohibited acts A

Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

§843. Communication facility

(b) It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter or subchapter II of this chapter. Each separate use of a communication facility shall be a separate offense under this subsection. For purposes of this subsection, the term "communication facility" means any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures, or sounds of all kinds and includes mail, telephone, wire, radio, and all other means of communication.

§846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

STATEMENT OF THE CASE AND FACTS

PROCEEDINGS BELOW

The record reflects that RICK RENNER was convicted in the United States District Court for the Middle District of Florida on one count of conspiracy to distribute marijuana and two counts of unlawful use of a telephone to facilitate distribution and conspiracy to distribute marijuana. On appeal to the Eleventh Circuit, RENNER argued that the evidence was insufficient to support the verdict and that the trial court improperly denied his motion for serverance. The Eleventh Circuit affirmed.

THE FACTS

In a 1979 undercover investigation called Operation Coldwater, F.B.I. agents operated Kings Court, an after hours bottle club in Holiday, Florida. The F.B.I. agents posed as underworld figures in order to make the club atmosphere conducive to discussion of illegal activities. Video and audio monitoring equipment was installed throughout the club.

Theopholis Nicholis, the man with whom RENNER was indicted and tried, was a frequent visitor to Kings Court. When he went there to socialize and tell war stories, the undercover gangster—agents engaged Nicholis in conversation about marijuana. The agents indicated that they needed a supply of marijuana on a weekly basis. Several of the conversations were recorded. Apparently, Nicholis believed that the gangster—agents were going to buy him an airplane.

At one of the meetings, Nicholis indicated that his source for marijuana was someone he had known in the military who was an Eastern Airlines mechanic in Miami. This description fit RENNER, among others. Also, Nicholis made phone calls to a Miami number listed to one Gary Riley. RENNER had told Nicholis that he could be reached at that number. A tape of one of the meetings revealed that Nicholis said he was going to call his source in Miami. He then telephoned someone called "Rick."

A few days later, Nicholis told the agents that they could pick up a sample of the marijuana at the Delta ticket counter at Miami International Airport. The person who delivered it was RICK RENNER. He handed the agent a sealed envelope. According to the agent, RENNER said, "the stuff was commercial grade, but it was the best that was around right now." The envelope contained a small amount of marijuana.

Both RENNER and Nicholis were charged with conspiring to distribute marijuana and two counts of unlawful use of a telephone to facilitate distribution and conspiracy. A copy of the indictment is included in the Appendix as Appendix 22-24.

RENNER was tried together with Nicholis. Both were sentenced to four years imprisonment for conspiracy and three years for each of the facilitation counts, to run concurrent with the conspiracy sentence.

On appeal, RENNER raised the issue of sufficiency of the evidence against him and the denial of his motion for a severance. The Eleventh Circuit rejected these arguments.

REASON FOR GRANTING THE WRIT

THE OPINION OF THE ELEVENTH CIRCUIT AFFIRMING RENNER'S CONVICTION OF CONSPIRACY AND FACILITATION CHARGES CONFLICTS WITH DECISIONS OF THIS COURT AND THE COURTS OF APPEALS FOR THE SECOND, SEVENTH, EIGHTH, NINTH AND TENTH CIRCUITS, AND SO FAR SANCTIONS A DEPARTURE BY THE TRIAL COURT FROM ACCEPTED JUDICIAL PROCESS AS TO CALL FOR THE EXERCISE OF THIS COURT'S SUPERVISORY POWER TO PREVENT MANIFEST INJUSTICE BECAUSE THE EVIDENCE AGAINST RENNER WAS INSUFFICIENT TO CONVICT ON ANY CHARGE, BUT HE WAS IRREPARABLY PREJUDICED BY THE MASSIVE SPILL-OVER EFFECT OF THE EVIDENCE AGAINST THE CO-DEFENDANT.

The opinion of the Eleventh Circuit conflicts with the following decisions: *Thompson -v- City of Louisville*, 362 U.S. 199, 80 S.Ct. 624 (1960); *U.S. -v- Bastone*, 526 F.2d 971 (7th Cir. 1976); *U.S. -v- Moss*, 591 F.2d 428 (8th Cir. 1979); *U.S. -v- Gaines*, 563 F.2d 1352 (9th Cir. 1977); *Tinsley -v- U.S.*, 43 F.2d 890 (8th Cir. 1930); *U.S. -v- Sisca*, 503 F.2d 1337 (11th Cir. 1973); and *U.S. -v- Watson*, 594 F.2d 1330 (10th Cir. 1979).

RICK RENNER was convicted of conspiracy and two telephone facilitation counts. The evidence was insufficient to support a conviction on any count. RENNER was denied his rights to a due process and a fair trial as

guaranteed by the Fifth and Sixth Amendments of the United States Constitution.

The *Thompson* doctrine of course, is that where the evidence fails to prove all elements of a charge, a conviction is not supported by evidence and does not comport with due process requirements.

A. The Conspiracy

The Government failed to sustain its burden of proof against RENNER on every element of the charge of conspiracy. A conspiracy cannot occur when the defendants are not working together towards a common goal. *Tinsley -v- U.S.*, 43 F.2d 890 (8th Cir. 1930). There was no evidence that RENNER was working together with Nicholis toward a common goal. Evidence of mere attendance at a meeting or knowledge of a conspiratorial act without more is not sufficient to support an inference of active participation in a conspiracy. See: *U.S. -v- Sisca*, 503 F.2d 1337, 1343 (2nd Cir. 1973). Mere association with an individual engaged in an illegal enterprise does not make a person a conspirator. *U.S. -v- Moss*, 591 F.2d 428, 435 (8th Cir. 1979).

To be convicted of an unlawful conspiracy a defendant must have knowledge of the conspiracy and must intend to join or associate himself with the objectives of the conspiracy; and a degree of criminal intent necessary for the substantive offense itself must be proven.

The evidence on the record below is patently deficient to support a conspiracy conviction. The Government failed to sustain its burden of proof. There was no evidence to show that RENNER knew of "the fundamental

purpose of the scheme." Nor was there evidence that RENNER knew about or was working toward a "common goal" with Nicholis. At best, Nicholis was shown to be a self-proclaimed drug expert boasting of his own exploits ranging from Colombia to Thailand. It is almost axiomatic to state that a conspiracy cannot occur where defendants are not working towards a common goal. *U.S. -v- Bastone*, 526 F.2d 971 (7th Cir. 1975).

The evidence showed that RENNER dropped off an envelope for a friend. There was no element of affirmative cooperation to violate the narcotics laws of the United States evidenced by RENNER. RENNER was merely acquiesing to his buddy's request. There was certainly not the requisite intent necessary to form a conspiracy. RENNER may be guilty of being a loyal friend and he may be guilty of using extremely poor judgment, but he is not guilty of conspiracy to distribute marijuana.

The range of reasonable hypotheses includes the hypothesis that RENNER was doing a friend a favor by giving a sealed envelope to a gentleman unknown to him, that he was not aware of Nicholis' grandiose boasts to undercover agents and that Nicholis intended to call and did call Gary Riley and not RENNER. The jury could not have reasonably found that the evidence was inconsistent with every reasonable hypothesis of innocence. Therefore, a reasonable jury must necessarily have entertained a reasonable doubt of RENNER'S guilt.

The evidence against RENNER is susceptible to innocent interpretation. RENNER was an old army buddy of Nicholis. RENNER never knew of Nicholis'

claims to illegal narcotics activity. RENNER was never involved in any telephone conversations with Nicholis. The call was not placed to RENNER'S number, and there was no voice identification of the person, if anyone, on the other end of the conversation. RENNER never knew what was in the sealed envelope which he received from Nicholis and delivered, still sealed, to the agent. The Government presented no evidence to establish beyond a reasonable doubt that RENNER knew of the contents of the envelope, much less of its connection to any conspiracy. "An individual's mere presence at the scene of a crime or mere association with persons involved in criminal enterprise is not sufficient to prove participation in a conspiracy." *U.S. -v- Menichino*, 497 F.2d 935 (5th Cir. 1974).

B. The Telephone Facilitation Counts

For the telephone facilitation counts, the Government had to prove the knowing and intentional use of the telephone to facilitate the commission of an offense. *U.S. -v- Rey*, 641 F.2d 222 (5th Cir. 1981). Further, whatever underlying offense is charged must be proved by a preponderance of the evidence, even though it is not separately charged. *U.S. -v- Watson*, 594 F.2d 1330 (10th Cir. 1979).

The Government clearly failed to meet its burden of proof as to the telephone counts. Nowhere in the trial did the Government prove that Nicholis actually spoke to RENNER on the two dates in question. Although RENNER did speak with Nicholis on the phone, he did not speak to Nicholis on the telephone at Gary Riley's house on these two particular dates. Also, RENNER

had been a visitor in Riley's home, there was no evidence introduced that he was present on those two occasions. The Government failed to offer a modicum of proof that it was RENNER on the telephone. The more likely explanation is that Nicholis was off on another flight of fantasy and was speaking to a dead receiver or to Gary Riley.

The evidence showed only that Nicholis stated he had several "sources" from which he could obtain marijuana, one in Tampa and one in Miami; Nicholis advised the undercover agents that he could provide them with 100 pounds a week. In an apparent effort to procure marijuana, Nicholis dialed a Miami telephone number which belonged to Gary Riley, an employee of Eastern Airlines. Never was there a voice identification of the person, if any, on the other end of the call.

While it is possible that RENNER was at Gary Riley's house when Nicholis made his calls, there was no voice identification of RENNER. There was no proof introduced that it was RENNER on the phone. It makes one wonder how the Government could spend thousands of dollars on an elaborate sting operation, yet not produce a positive identification of the voice on the phone. Clearly, Nicholis could have been speaking to Mr. Riley on the phone, or someone else. However, whoever Nicholis spoke to, was not necessarily a knowing or willing participant in his grandiose schemes. Clearly, the Government did not sustain its burden of proof as to the telephone facilitation counts.

C. Denial of Severance

With respect to denial of RENNER's motion for severance, it resulted in a massive spill-over effect from hours and hours of taped conversations involving Nicholis. Throughout some eight hours of video tapes, the jury was treated to Nicholis' bragging about his exploits in the narcotics trade, his ability to procure opium, heroin, hashish, cocaine, quaaludes and marijuana and his expertise as a drug trafficker.

Although RENNER was not seen or heard from on any of the tapes, he was painted with the same tainted brush that surely convicted Nicholis.

Poor RENNER was swept under by the tide of evidence against Nicholis.

An even more serious problem with the joint trial below is that Nicholis' trial counsel just "rolled over and played dead" in the face of what may have appeared to be overwhelming evidence against his client, even though there was a viable and effective defense available to Nicholis. That defense was never pursued or even raised by his acquiescent trial counsel.

The test to be applied for severance is:

> Whether under all circumstances of the particular case . . . it is within the capacity of the jurors to follow the court's admonitory instructions and accordingly to collate and appraise the independent evidence against each defendant solely upon that defendant's own acts, statements and conduct. In sum, can the

> jury keep separate the evidence that is relevant to each defendant and render a fair and impartial verdict as to him.

Tillman -v- U.S., 406 F.2d 930 (5th Cir. 1977)

The prime consideration in determining whether to order a severance is whether the jury can reasonably be expected to compartmentalize the evidence as it relates to separate defendants in the light of its volume and of any limited admissibility. *U.S. -v- Gaines*, 563 F.2d 1352 (9th Cir. 1977).

The answer in this case is a resounding no. The huge spill-over produced by the numerous taped conversations of Nicholis surely condemned RENNER to a guilty verdict without the requisite proof.

CONCLUSION

For the foregoing reasons, Petitioner, RICK RENNER, respectfully prays that the Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit be granted.

Respectfully submitted

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DATED this 4th day of March, 1985.

Appendix

INDEX TO APPENDIX

JUDGMENT AND SENTENCE
(4/27/1984) ..... App. 1-3

OPINION OF ELEVENTH CIRCUIT
COURT OF APPEALS (11/30/1984) ..... App. 4-14

PETITION FOR REHEARING
(12/16/84) ..... App. 15-20

ORDER OF DENIAL OF REHEARING
(1/11/1985) ..... App. 21

INDICTMENT (9/27/1983) ..... App. 22-24

MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION

DOCKET NO. 83-106 Cr-T-15

RICK RENNER

Defendant

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date April 27, 1984.

with Counsel MAX ENGEL

PLEA NOT GUILTY

JUDGMENT

There being a verdict of GUILTY. Defendant has been convicted as charged of the offense(s) of

Count One: Conspiracy to distribute Schedule I controlled substance; Marijuana; 21;841(a)(1) & 21;846

Counts Two & Three: Use of communication facility (telephone) in commission of felony; 21;843(b)

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appealed

to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

COUNT ONE: FOR (4) YEARS

COUNTS TWO & THREE: THREE (3) YEARS each count, to run concurrent to each other and the sentence of imprisonment imposed on Count One.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

M'FILM ROLL # 87
DOCUMENT # 562

SIGNED BY U.S. District Judge
WILLIAM J. CASTAGNA

Date April 27, 1984

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-3292
Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

THEOPHILOS E. M. NICHOLIS,
RICK RENNER,

Defendants-Appellants.

Appeals from the United States District Court for the Middle District of Florida

(November 30, 1984)

Before VANCE, HENDERSON and CLARK, Circuit Judges.

PER CURIAM:

Theophilos E. M. Nicholis and Richard Renner appeal their convictions in the United States District Court for the Middle District of Florida on one count of conspiring to distribute marijuana in violation of 21 U.S.C. §§ 841(a)(1), 846 (1982) and two counts of unlawful use of a telephone to facilitate the distribution of marijuana and a conspiracy to distribute in violation of 21 U.S.C. § 843(b) (1982). Nicholis alleges ineffective assistance of

counsel while Renner maintains that the evidence was insufficient to support the verdict and that the district court erred in denying his motion for severance. Concluding that all the assignments of error lack merit, we affirm.

As part of a 1979 undercover investigation known as Operation Coldwater, Federal Bureau of Investigation (FBI) agents operated an after-hours bottle club in Holiday, Florida, for the purpose of providing a meeting place for individuals suspected of illegal activities. Several FBI agents posed as underworld figures in order to make the club atmosphere conducive to discussion of such activities. Video and audio monitoring equipment was installed in the lounge area, game room, and office, and off-site agents monitored all activities on a 24-hour basis.

Nicholis was a frequent visitor to the club. At the trial, undercover FBI agents testified they had meetings with Nicholis to discuss Nicholis' ability to supply the agents with a quantity of marijuana on a weekly basis. Conversations between the agents and Nicholis were recorded on numerous occasions.

At a meeting held on October 22, 1980 between Nicholis and two of the FBI agents, Nicholis indicated that his source for the marijuana was someone he had known in the military who was currently an aircraft mechanic for Eastern Airlines in Miami. This description fit Renner. In addition, during discussions with the agents about supplying marijuana, Nicholis made phone calls to a number in Miami listed in the name of Gary Riley, an acquaintance of Renner. Renner had previously told Nicholis that he could be reached at this number.

A tape of a meeting between Nicholis and an agent on October 24, 1980 revealed a phone conversation between Nicholis and someone he called "Rick." Prior to making one of the calls, Nicholis informed the agents that he was going to call his source in Miami.

On October 28, 1980, Nicholis again met with agents in the parking lot of the club and told them he had made arrangements to receive a sample of the marijuana. Nicholis indicated that one of the agents was to meet Nicholis' source at the Delta ticket counter at Miami International Airport. According to Nicholis' description, the source would be dressed in an Eastern Airlines uniform. The agent was to introduce himself as a friend of Nicholis.

Renner appeared at the designated time and place attired in an Eastern Airlines uniform. He handed the agent an envelope and told him "the stuff was commercial grade but it was the best that was around right now." Record, Vol. 4, at 51-52. After the meeting, the agent opened the envelope and discovered that it contained a small amount of marijuana.

A three count indictment charged the appellants with conspiring to distribute marijuana and with unlawful use of a telephone to facilitate the distribution and conspiracy to distribute marijuana. The appellants were convicted on all counts. They were both sentenced to four years imprisonment on the conspiracy count and three years on each of the facilitation counts, to run concurrently with the conspiracy conviction.

Nicholis contends that he was denied the effective assistance of counsel at his trial. The general rule in this circuit is that ineffective assistance claims "will not be addressed on direct appeal from a criminal conviction because an evidentiary hearing . . . is often required for development of an adequate record." *Vick v. United States*, 730 F.2d 707, 708 (11th Cir. 1984) (citation omitted). Even considering the merits of Nicholis' claim, it is clear that it lacks merit.

The United States Supreme Court recently articulated standards to guide courts evaluating ineffective assistance of counsel claims. In *Strickland v. Washington*, ____ U.S. ____, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the Court held that a defendant must demonstrate that (1) counsel's performance was deficient, and (2) the actual representation rendered by the attorney prejudiced the defense. *Id.* at ____, 104 S.Ct. at 2064, 80 L.Ed.2d at 693. To establish the prejudice element, the defendant must show that counsel's errors deprived him of a fair trial. *Id.* This entails a showing of "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at ____, 104 S.Ct. at 2068, 80 L.Ed.2d at 698. *See also Chadwick v. Green*, 740 F.2d 897, 900 (11th Cir. 1984); *Boykins v. Wainwright*, 737 F.2d 1539, 1542-43 (11th Cir. 1984); *Solomon v. Kemp*, 735 F.2d 395, 402 (11th Cir. 1984). The standard enunciated by the Court in *Strickland* for judging ineffective assistance claims thus focuses on the effect of counsel's alleged deficiencies on the outcome of the trial. *Boykins v. Wainwright*, 737 F.2d at 1543. Given this standard, we find that Nicholis failed to make the required showing of prejudice.

Nicholis faults his attorney's failure to investigate and pursue viable defenses to the charges, to prepare pretrial motions and voir dire questions, to investigate and prepare adequately, and to make proper objections. Even assuming the correctness of these allegations, Nicholis has made little attempt to demonstrate how these alleged inadequacies altered the result reached at his trial. There was substantial incriminating evidence. FBI agents testified that they met with Nicholis on numerous occasions to discuss the distribution of marijuana. Videotapes of those meetings depicted Nicholis discussing his ability to provide a steady supply of the drug and using the telephone to contact his source of supply. In light of this evidence, we cannot say that the conduct of Nicholis' trial counsel "so undermined the proper functioning of the adversial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, ____ U.S. at ___, 104 S.Ct. at 2064, 80 L.Ed.2d at 692-93.

Renner first attacks the sufficiency of the evidence to support his convictions. He therefore contends that the district court erred in denying his motion for judgment of acquittal. In reviewing a claim of insufficiency of the evidence, the appellate court must examine the record of the case in the light most favorable to the government, *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed 680, 704 (1942), and accept all reasonable inferences and credibility choices that tend to support the verdict. *United States v. Rodriguez-Arevalo*, 734 F.2d 612, 615 (11th Cir. 1984). Using that criteria, we must determine if a reasonable juror could find the defendant guilty beyond a reasonable doubt. *United States v. Corbin*, 734 F.2d 643, 650 (11th Cir. 1984). "It

is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt . . . . A jury is free to choose among reasonable constructions of the evidence." *United States v. Bell*, 678 F.2d 547, 549 (5th Cir. Unit B 1982) (en banc), *aff'd on other grounds*, ____ U.S. ____, 103 S.Ct. 2398, 76 L.Ed.2d 638 (1983).[1]

To support a conspiracy conviction, the government must prove (1) that a conspiracy existed, (2) that the defendant had knowledge of the conspiracy, and, (3) that armed with such knowledge, the defendant voluntarily participated in the conspiracy. *Rodriguez-Arevalo*, 734 F.2d at 615; *United States v. Elledge*, 723 F.2d 864, 866 (11th Cir. 1984); *United States v. Blasco*, 702 F.2d 1315, 1330 (11th Cir.), *cert. denied*, ____ U.S. ____, 104 S.Ct. 275, 78 L.Ed.2d 256 (1983). The existence of the conspiratorial agreement can be proved through circumstantial evidence such as inferences drawn from the conduct of the defendant or the circumstances indicating a scheme. *United States v. Badolato*, 701 F.2d 915, 920 (11th Cir. 1983). The defendant need not have knowledge of all the details of the conspiracy, but only a knowledge of the essential objective of the conspiracy. *United States v. Tamargo*, 672 F.2d 887, 889 (11th Cir.), *cert. denied*, 459 U.S. 864, 103 S.Ct. 141, 74 L.Ed.2d 119 (1982); *United States v. Alvarez*, 625

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[1]Renner advances an incorrect standard of review for the sufficiency of the evidence. United States v. Bell, 678 F.2d 547 (5th Cir. Unit B 1982) (en banc), *aff'd on other grounds*, ____ U.S. ____, 103 S.Ct. 2398, 76 L.Ed.2d 638 (1983), expressly rejected the "reasonable hypothesis of innocence" test. The holding in *Bell* is binding on this circuit. *See* United States v. Corbin, 734 F.2d 643, 653 (11th Cir. 1984).

F.2d 1196, 1198 (5th Cir. 1980) (en banc), *cert. denied*, 451 U.S. 938, 101 S.Ct. 2017, 68 L.Ed.2d 324 (1981).[2] In conspiracy cases brought pursuant to 21 U.S.C. § 846, proof of an overt act is not necessary. *Elledge*, 723 F.2d at 866; *Blasco*, 702 F.2d at 1330. The defendant's knowing participation in the conspiracy may be inferred from acts which further the conspiracy's purpose. *United States v. Vera*, 701 F.2d 1349, 1357 (11th Cir. 1983); *United States v. Marx*, 635 F.2d 436, 439 (5th Cir. Unit B 1981).

Renner claims that the evidence did not show that he was aware of the contents of the envelope, that he and Nicholis were working toward a common goal, and that he affirmatively cooperated with Nicholis. Viewing the evidence in the light most favorable to the government, however, we find that a reasonable jury could conclude that Renner knowingly participated in the conspiracy to distribute marijuana. The existence of the conspiracy and Renner's knowing, voluntary participation in the plan could be reasonably inferred from Renner's appearance at the airport at the designated time and place, dressed as described by Nicholis. Furthermore, the jury could infer from his statement made to the agent at the airport that he knew of the essential purpose of the conspiracy.

Renner also challenges the adequacy of the government's proof on the two facilitation counts. In order to establish a violation of 21 U.S.C. § 843(b), the government must show a (1) knowing or intentional (2)

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[2]In Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc), this court adopted as precedent all decisions of the former Fifth Circuit decided prior to October 1, 1981.

use of a telephone (3) to facilitate the commission of an offense. 21 U.S.C. § 843(b); *United States v. Ward*, 696 F.2d 1315, 1319 (11th Cir.), *cert. denied*, ____ U.S. ____, 103 S.Ct. 2101, 77 L.Ed.2d 308 (1983); *United States v. Rey*, 641 F.2d 222, 224 n. 6 (5th Cir. Unit A), *cert. denied*, 454 U.S. 861, 102 S.Ct. 318, 70 L.Ed.2d 160 (1981). Renner maintains that the government failed to prove any of the necessary elements of 21 U.S.C. §843(b).

Various FBI agents involved in the undercover operation testified that Nicholis stated on the dates under investigation[3] that he was going to call his "source" in Miami and that Nicholis had identified his source as someone he had known in the service who was currently a mechanic for Eastern Airlines, a description that fit Renner. Record, Vol. 4, at 44-48. Telephone records for the bottle club disclosed that on these dates, calls were placed to a number in Miami listed in the name of Gary Riley, an acquaintance of Renner. Record, Vol. 5, at 178-79; Vol. 6, at 189-90. According to Nicholis, Renner had given him a number to call when Renner could not

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[3]The indictment charged Nicholis and Renner with ulawfully using the telephone to facilitate the commission of a drug offense on or about October 24, 1980 and October 27, 1980. There is a discrepancy in the testimony as to the date of the second call. An FBI agent involved in the undercover operation testified that Nicholis placed a telephone call to his source on October 26, 1980. The agent made no mention of a call on October 27th. He testified that the next meeting occurred on October 28th. Record, Vol. 4, at 47-48; Vol. 5, at 91-92. This discrepancy does not invalidate the indictment, however. An indictment charging a violation of 21 U.S.C. § 843(b) does not have to allege the exact date of the telephone call. *See* United States v. Ramos, 666 F.2d 469, 474 (11th Cir. 1982) (citing United States v. Murray, 492 F.2d 178, 192 (9th Cir.), *cert. denied*, 419 U.S. 942, 95 S.Ct. 210, 42 L.Ed.2d 166 (1974)).

be reached at home, Record, Vol. 6, at 243-44, and Renner admitted furnishing Nicholis with Riley's phone number. Record, Vol. 6, at 284. Renner denied that he received a phone call from Nicholis on either of the dates alleged in the indictment, but did state that on one occasion Nicholis contacted him regarding Nicholis' need for a supply of marijuana. Renner claimed that he told Nicholis he was not interested. Record, Vol. 6, at 278-81. Finally, an agent involved in the operation testified that Nicholis asked for money to cover the cost of the calls made to Renner. Record, Vol. 4, at 56.

We believe that this evidence, was sufficient to sustain Renner's conviction on the facilitation counts. Although the government introduced no direct evidence placing Renner at the receiving end of the phone calls, the jury could reasonably conclude that Nicholis' calls to his source in Miami were made to Renner, an individual who fit Nicholis' description of his source as an Eastern Airlines mechanic. Furthermore, the jury was free to disregard Renner's denials that he received the phone calls at Riley's telephone number. A videotape of one of the calls revealed Nicholis' request to speak to "Rick."

In addressing Renner's final argument that the district court erred in denying his motion for severance,[4]

[4]The government contends that Renner did not preserve this issue for appeal because he failed to make a motion for severance in the district court. According to the government's brief, an assistant to Renner's counsel advised the government that the motion was made orally and denied at a status conference on November 30, 1983. The proceedings of this conference are not a part of the record on appeal. Even without considering whether the issue was properly pursued at the trial level, it is clear that this ground of error is without merit.

we begin by pointing to the general rule that defendants jointly indicted should be tried together in the interest of judicial economy. *United States v. Sans*, 731 F.2d 1521, 1533 (11th Cir. 1984); *United States v. Marszalkowski*, 669 F.2d 655, 660 (11th Cir.), *cert. denied*, 459 U.S. 906, 103 S.Ct. 208, 74 L.Ed.2d 167 (1982). Rule 14 of the Federal Rules of Criminal Procedure provides an exception to this rule "[i]f it appears that a defendant . . . is prejudiced by a joinder of . . . defendants."[5] The district court's denial of a severance motion will not be disturbed on appeal, however, absent a showing of abuse of discretion. To constitute such an abuse, there must be "compelling prejudice" arising from the decision not to sever. *United States v. Corbin*, 734 F.2d 643, 648 (11th Cir. 1984); *Sans*, 731 F.2d at 1533. "Compelling prejudice" is defined in this circuit and as the jurors' inability

> 'to follow the court's admonitory instructions and accordingly to collate and appraise the independent evidence against each defendant solely upon that defendant's own acts, statements and conduct. In sum, can the jury keep separate

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[5]Fed.R.Crim.P. 14 states:

> If it appears that a defendant or the government is prejudice by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

> the evidence that is relevant to each defendant and render a fair and impartial verdict as to him? If so, though the task be difficult, severance should not be granted.'

Marszalkowski, 691 F.2d at 660 (citations omitted).

Prejudice is claimed in this case because Renner's trial counsel "lost unfettered control of [his] defense" due to the inadequacies of Nicholis' counsel and because of the "spill-over" effect of the evidence against Nicholis. Renner has failed to make any showing that the alleged errors of Nicholis' counsel resulted in compelling prejudice. Nor do we find any evidence that he was prejudiced by the "spill-over" of the case against Nicholis. To establish prejudice from the "spill-over" effect, it would be necessary for Renner to show the jury's inability to make an individualized determination as to each defendant. Merely demonstrating that the evidence was stronger against a co-defendant does not satisfy this burden. *United States v. Johnson*, 713 F.2d 633, 640 (11th Cir. 1983), (citation omitted), *cert. denied*, ____ U.S. ____, 104 S.Ct. 1447, 79 L.Ed.2d 766 (1984). As demonstrated by the facts recited earlier, there is sufficient evidence against Renner alone to uphold his convictions. Furthermore, the district court's instruction that the jury should consider the case against each defendant separately limited the likelihood of any "spill-over" effect. *Johnson*, 713 F.2d at 640. Under these circumstances, Renner has failed to make the requisite showing of compelling prejudice to support a finding that the district court abused its discretion in denying his motion for severance.

For the foregoing reasons, the judgments of conviction are AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS,
FOR THE ELEVENTH CIRCUIT

NO. 84-3292

RICK RENNER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING

LAW OFFICES OF MAX P. ENGEL
Attorneys for the Appellant
1461 N.W. 17th Avenue
Miami, Florida
305/325-1810

Appellant, RICK RENNER, through counsel and pursuant to Rule 40 of the Federal Rules of Appellate Procedure and Rule 26 of the Rules of the Eleventh Circuit, files this petition for a rehearing addressed to the Court's decision entered on November 30, 1984. In support of this petition, Appellant states the following points of law and fact which, in his opinion, the Court has overlooked or misapprehended:

I.

With respect to the panel's affirmance of Renner's conviction of conspiracy it is respectfully suggested that the Government has failed to prove each element of that offense beyond a reasonable doubt.

The panel seems to have overlooked several basic concepts in the law of conspiracy. For example, a conspiracy cannot occur where the defendants are not working together towards a common goal. *Tinsley* -v- *U.S.*, 43 F. 2d 890 (8th Cir., 1930). There was no evidence that Renner was working together with Nicholis toward a common goal. Evidence of mere attendance at a meeting or knowledge of a conspiratorial act without more, is not sufficient to support an inference of active participation in the conspiracy. See: *U.S.* -v- *Sisca*, 503 F. 2d 1337, 1343 (2nd Cir., 1973). Mere association with an individual engaged in an illegal enterprise does not make a person a conspirator. *U.S.* -v- *Moss*, 591 F. 2d 428, 435 (8th Cir., 1979). To be convicted of an unlawful conspiracy a defendant must have knowledge of the conspiracy and must intend to join or associate himself with the objectives of the conspiracy; and a degree of criminal intent necessary for the substantive offense itself must be proven. See: *U.S.* -v- *Malatesla*, 590 F. 2d 1379, 1381 (5th Cir., 1979). The evidence, on the record presented in this case is patently deficient to support Renner's conviction.

The Government failed to sustain its burden of proof.

There was no evidence to show that Renner knew of "the fundamental purpose of the scheme." Nor was

there evidence that Renner knew about or was working toward a "common goal" with Nicholis.

The evidence showed that Renner dropped off an envelope for a friend. There was no element of affirmative cooperation to violate the narcotics laws of the United States evidenced by Renner. Renner was merely acquiesing to his buddy's request; there was certainly not the requisite intent necessary to form a conspiracy.

Renner may be guilty of being a loyal friend and he may be guilty of using extremely poor judgment, but he is not guilty of conspiracy to distribute marijuana.

II.

With respect to the panel's affirmance of Renner's conviction of the two telephone facilitation counts, the panel seems to have overlooked the total failure of proof that Nicholis actually spoke to Renner on the two dates in question.

Although Renner had been to Riley's home, there was no evidence that he was there on those two dates. The Government offered not one iota of proof that it was Renner on the telephone. The more likely explanation is that Nicholis was off on another flight of fantasy and was speaking to a dead receiver or to Riley.

The evidenced showed only that Nicholis stated he had several "sources" from which he could obtain marijuana, one in Tampa and one in Miami; Nicholis advised the undercover agents that he could provide 100 pounds a week; in an apparent effort to procure

marijuana, Nicholis dialed a Miami telephone number which belonged to Gary Riley, an employee of Eastern Airlines. Never was there a voice identification of the person, if any, on the other end of the call.

Clearly, the Government did not sustain its burden of proof as to any of the telephone facilitation counts.

III.

With respect to the issue of the trial court's denial of Renner's motion for a severance, it is respectfully suggested the panel must have overlooked or misapprehended the massive spill-over effect of the hours and hours of taped conversations involving Renner's co-defendant, Nicholis. Throughout some eight hours of video tapes, the jury was treated to Nicholis' bragging about his exploits in the narcotics trade, his ability to procure opiuim, heroin, hashish, cocaine, quaaludes and marijuana and his savy as a drug trafficker.

Although Renner was not seen or heard on any of the tapes, he was painted with the same tainted brush that surely convicted Nicholis and poor Renner was swept under by the tide of evidence against Nicholis.

An even more serious problem with the joint trial below is that Nicholis' trial counsel just "rolled over and played dead" in the face of what may have appeared to be overwhelming evidence against his client. However, for reasons explained in detail in the petition for rehearing filed on behalf of the co-defendant/co-appellant, Nicholis there was a viable and effective defense available to Nicholis which was never pursued or even raised by

his acquiescent trial counsel. The petition for rehearing filed on behalf of Nicholis is incporated by reference as though set forth in its entirety herein.

Thus, the denial of a severance was so prejudicial to Renner as to warrant a new trial.

IV.

Therefore, there being insufficient evidence to convict Renner of conspiracy or of the telephone facilitation counts, the conviction on all three counts should have been reversed with directions that Renner be discharged. Alternatively, the cause should be reversed with directions that Renner receive a new trial based upon the severe and irremediable prejudice visited upon Renner by the failure of the trial court to sever his trial from that of co-defendant Nicholis.

Accordingly, Renner respectfully prays that the Court will grant this petition for rehearing and such further relief as the Court deems proper.

Respectfully submitted,

LAW OFFICES OF MAX P. ENGEL
Attorney for the Appellant Renner
1461 N.W. 17th Avenue
Miami, Florida
305/325-1810

BY /s/ Max P. Engel
MAX P. ENGEL

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Petition for Rehearing was mailed to the United States Attorney's Office, 155 South Miami Avenue, Miami, Florida, this [Illegible] day of December, 1984.

/s/ Max P. Engel

OF COUNSEL

[FILED JAN 11 1985]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-3292

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RICK RENNER,

Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

ON PETITION FOR REHEARING

(November 30, 1984)

Before VANCE, HENDERSON and CLARK, Circuit Judges.

PER CURIAM:

The petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied

ENTERED FOR THE COURT:

/s/ [Illegible]
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 83-106 Cr-T WC(15)

UNITED STATES OF AMERICA

v.

THEOPHILOS E. M. NICHOLIS
and
RICK RENNER

The Grand Jury charges that:

COUNT ONE

From on or about October 7, 1980, to on or about November 14, 1980, at Tampa, in the Middle District of Florida, and elsewhere, the Defendants.

THEOPHILOS E. M. NICHOLIS
and
RICK RENNER

knowingly, intentionally and unlawfully, conspired, combined, confederated and agreed, with and among themselves and others, to distribute the Schedule I controlled substance, marijuana, contrary to Title 21, United States Code, section 841(a)(1) and in violation of Title 21. United States Code, section 846.

COUNT TWO

On or about October 24, 1980, in the Tampa Division of the Middle District of Florida, the Defendants

THEOPHILOS E. M. NICHOLIS
and
RICK RENNER

knowingly, intentionally and unlawfully used a communication facility, a telephone, to facilitate the commission of a felonious violation of Title 21, United States Code, sections 841(a)(1) and 846, concerning the distribution of marijuana and a conspiracy to commit that offense: that is, they used a telephone to discuss arrangements for a distribution of marijuana.

All in violation of Title 21, United States Code, section 843(b).

COUNT THREE

On or about October 27, 1980, in the Tampa Division of the Middle District of Florida, the Defendants

THEOPHILOS E. M. NICHOLIS
and
RICK RENNER

knowingly, intentionally and unlawfully used a communication facility, a telephone, to facilitate the commission of a felonious violation of Title 21, United States Code, sections 841(a)(1) and 846, concerning the distribution of marijuana and a conspiracy to commit

that offense: that is, they used a telephone to discuss arrangements for delivering a sample of marijuana:

All in violation of Title 21, United States Code, section 843(b).

A TRUE BILL

/s/ [Illegible]
FOREMAN

ROBERT W. MERKLE
United States Attorney

By: /s/ Lee Wm. Atkinson
LEE WM. ATKINSON
Assistant United States Attorney

/s/ George E. Tragos
GEORGE E. TRAGOS
Chief Criminal Division